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IN THE

Supreme Court of the United States

DAVID G. WALSH *et al.*,
Petitioners,

v.

BADGER CATHOLIC, INC., formerly known as Roman Catholic Foundation, UW-MADISON, INC. *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Respondents argue that this Court has definitively resolved whether a government must provide access to a limited public forum for religious worship, proselytizing, or inculcation of a particular religious belief. Resp. Br. at 1. That argument flies in the face of this Court's express reservation of the issue and the circuit split that even Respondents concede exists.

Respondents do not contend that the issue is unimportant, nor could they. As the Petition and supporting brief of Amici[1] demonstrate, federal funding decisions as well as the funding decisions of public universities across the Nation presume that religious worship is categorically different than other types of subsidized speech—a difference supported by the text and structure of the First Amendment.

The Court should grant the Petition to at last resolve this question of national importance.

ARGUMENT

I. The Petition Presents An Issue Of National Importance That Has Divided Federal Circuit Courts.

A. This Court Has Carefully And Consistently Reserved The Question Presented For Later Determination.

Respondents contend that the Question Presented has long ago been "resolved." Resp. Br.

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[1] Brief for *Amici Curiae* American Council on Education and Six Other higher Education Organizations in Support of Petitioners ("Amici").

at 1. However, as set forth in the Petition (Pet. at 15-19), a careful review of this Court's limited public fora proves otherwise.

Respondents first rely on this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), in which this Court held that a university could not single out religious organizations for discriminatory treatment in denying access to the university's facilities. *See, e.g.*, Resp. Br. at 17-18. *Widmar*'s analysis is inapposite, as it applied a strict scrutiny level of review that is inapplicable to this Court's current limited public fora jurisprudence. Pet. at 16-17; *see also Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2987 (2010) (explaining and distinguishing *Widmar* on similar basis).

In short, Respondents are at a loss to explain why this Court has gone out of its way to note that it was preserving the issue for another day if, in fact, the issue was already resolved by this Court in *Widmar*. *See, e.g., Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384, 387-88 n.2 (1993); *see also* Pet. at 15-19.

Respondents also suggest, citing in part Justice Souter's dissenting opinion, that in *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), this Court upheld the "use of the school facilities for prayer, worship, proselytizing and religious instruction" and thus rejected any distinction between speech from a "religious viewpoint" and "religious worship." Resp. Br. at 30. Respondents fail to note that while the *Good News Club* majority agreed that Justice Souter's recitation of the activities was accurate, it expressly rejected Justice Souter's characterization of the activities as constituting "worship." 533 U.S. 98, 112 n.4 (2001); *see also Bronx Household of Faith v.*

Bd. of Educ., 331 F.3d 342, 353 (2d Cir. 2003) ("*Bronx Household II*") (observing that the *Good News* Club majority "explicitly rejected [Justice Souter's] characterization of the Club's activities as an 'evangelical service of worship'"). If Respondents were correct, then the *Good News Club* majority's footnote four would have been unnecessary, for even activities that solely amounted to "mere religious worship" would be entitled to access the forum. *Id.*

This Court's careful delineation between speech from a religious viewpoint and core religious activities such as religious worship has not gone unnoticed by federal courts. *See, e.g., Campbell v. St. Tammany Parish Sch. Bd.*, No. 98-2605, 2003 WL 21783317, at *8 (E.D. La. July 30, 2003) ("The Supreme Court has not held that a religious service or religious worship may not be excluded from a limited forum"). Indeed, the lack of a clear ruling from this Court on this subject of doubt led Judge Walker to explicitly call for this Court to resolve this issue in his dissent. *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 132 (2d Cir. 2007) ("*Bronx Household III*"); *see also* Pet. at 28-29 (citing legal commentators to the same effect).

B. As Respondents Concede, Federal Circuit Courts Are Divided Over The Question Presented.

Respondents cannot seriously dispute that there is a circuit split and confusion in the lower courts. They attempt to marginalize the Ninth Circuit's decision in *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 915 (9th Cir. 2007), by

referring to it as an "outlier."[2] Resp. Br. at 33, 38. However, the Ninth Circuit's recognition that "[r]eligious worship . . . is not a viewpoint but a category of discussion within which many different religious perspectives abound," *id.* at 915, was shared by the Second Circuit in *Bronx Household of Faith v. Community School District No. 10*, 127 F.3d 207, 215 (2d Cir. 1997) ("*Bronx Household I*") (observing that "[t]he distinction between [discussion of secular matters from a religious viewpoint] on the one hand, and religious services and instruction on the other, is not difficult for school authorities to make" and concluding that this distinction is "viewpoint neutral"). Judge Calabresi reached the same conclusion in *Bronx Household III*, 492 F.3d at 98 ("I conclude that the barring of worship services from defendants' school facilities is a content-based

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[2] Respondents also attempt to discredit the Ninth Circuit's decision in *Faith Center* by stating that on remand "the District Court declared unconstitutional the policy excluding the church's worship service." Resp. Br. at 39. On remand, the District Court recognized that the public library's policy of prohibiting the use of library meeting rooms for conducting religious worship services was a viewpoint neutral restriction. *Faith Center Church Evangelistic Church v. Glover*, No. C-04-03111 JSW, 2009 WL 1765974, at *7 (N.D. Cal. June 19, 2009). The District Court held, however, that the library's policy violated the Establishment Clause—rather than the Free Exercise Clause or the Equal Protection Clause—by excessively entangling the library in the church's affairs by requiring library staff to make the ultimate determination as to whether a proposed use of the meeting room constituted religious worship services. *Id.* at *9. Here, the University relied on, and deferred to, Respondents' own identification as programs primarily constituting religious worship or proselytizing activities. *See infra* Part II.A.

restriction and does not constitute viewpoint discrimination"),[3] as did the Fifth Circuit in *Campbell v. St. Tammany's Sch. Bd.*, 206 F.3d 482, 487 (5th Cir.), *reh'g denied*, 231 F.3d 937 (5th Cir. 2000), *GVR'd*, 533 U.S. 913 (2001), *on remand*, 300 F.3d 526 (5th Cir. 2002), *on remand*, 2003 WL 21783317 (E.D. La. July 30, 2003) ("The District has excluded [religious services] but does not forbid speakers on general topics with a religious perspective—a distinction that viewpoint neutrality permits").

The court of appeals decisions discussed in the Petition (Pet. at 20-28) and by amici (Amici Br. at 15-20), and even Respondents discussions of these cases, highlight the uncertainty and lack of uniformity in the courts below. Guidance from this Court is therefore necessary.

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[3] Respondents contend that in light of the divergent opinions in *Bronx Household III*, which led to a per curium decision without a majority rationale, the Second Circuit's decision in *Bronx Household II* currently controls. Resp. Br. at 37. The Second Circuit in *Bronx Household II*, however, expressly declined to revisit its holding in *Bronx Household I* that a "permissible distinction may be drawn between religious worship and other forms of speech from a religious viewpoint," deeming this question unnecessary to reach in order to resolve the issue before the court. 331 F.3d at 355; *see also* Pet. at 24-25 (noting even Judge Walker in his *Bronx Household III* dissent recognized a distinction between religious worship and other forms of speech).

II. This Case Presents An Ideal Opportunity For This Court To Address The Question Presented.

A. The Activities Unquestionably Consist Of Religious Worship.

Respondents inaccurately claim that "University officials refused to release SUF funds for any activities that involved *what the University* determined to be student-led prayer, worship, 'proselytizing,' or the inculcation of values." Resp. Br. at 8 (emphasis added). The summary judgment record is uncontroverted: The identification as to which programs, if any, primarily involved religious worship or proselytizing was made by the students *alone*. App. 24a. The University relied on those identifications. App. 24a. The District Court had no difficulty concluding "the undisputed facts are sufficient to demonstrate that [Respondents'] activities included substantial prayer and worship components." App. 90a-91a.[4]

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[4] The University thus avoids excessive entanglement issues. The Ninth and Tenth Circuits have held that reliance on a church's self-identification can avoid excessive entanglement in distinguishing between religious worship and speech from a religious perspective. *See Faith Center*, 480 F.3d at 918 & n.18; *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008); *see also Campbell v. St. Tammany Parish Sch. Bd.*, 300 F.3d 526, 529 (5th Cir. 2002) (Gibson, J., concurring) (observing that in contrast to *Rosenberger*, *Lambs' Chapel*, and *Good News Club*, the "facts before us involve no need for the school officials to impose their own characterization on the applicant's proposed use").

B. Resolution Of The Question Presented Will Provide Important Guidance To Universities Throughout The Country.

The University has adopted its funding policy to ensure that its segregated fees support a diversity of views consistent with the State's constitutional mandate.[5] As *Locke v. Davey*, 540 U.S. 712 (2004), shows, the First Amendment does not require otherwise.[6] *See generally Colorado Christian*, 534 F.3d at 1254.

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[5] Respondents mistakenly claim that Petitioners failed to invoke the Wisconsin Constitution's prohibition against sectarian funding in the district court. Resp. Br. at 26 n.4. In fact, Respondents have consistently pointed to the University's antiestablishment concerns under both the federal and state constitutions. *See* Def.'s Br. in Opp. to Pl.'s Mot. for Summ. J. at 12, W.D. Wis. No. 3:07-cv-00505 (filed May 30, 2008) (Dkt #136) ("Most relevant for the issues of this case, the provision of the Wisconsin Constitution . . . states, in relevant part: 'no sectarian instruction shall be allowed in such university'"); Opening Br. at 2, 7th Cir. No. 09-1102 (filed Apr. 27, 2009) (quoting same).

[6] Respondents attempt to discredit *Locke's* application to the Question Presented by claiming that *Locke* was limited "to the specific facts of the case." Courts have recognized that *Locke* has broader application. *See, e.g., Colorado Christian*, 534 F.3d at 1254 ("we are disinclined to think that *Locke* is confined to its facts"); *Eulitt v. Dep't of Educ.*, 386 F.3d 344, 354, 355 (1st Cir. 2004) (observing that *Locke* "confirms that the Free Exercise Clause's protection of religious beliefs and practices from direct government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they choose to fund the secular equivalents of such activity" and rejecting attempt to "cabin [*Locke*] and restrict its teachings to the context of funding instruction for those training to enter religious ministries"); *see also Bush v. Holmes*, 886 So.2d 340, 344 (Fla Dist. Ct. App. 2004) (holding, based in part on *Locke*, that Florida constitution's no-aid provision did not

In promoting important extracurricular activities, which this Court has recognized can be an important part of a university's educational mission, *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 233 (2000), the University has drawn a distinction between religious worship and other types of speech. As Amici have noted, numerous other post-secondary schools across the country have adopted similar distinctions in providing funding for limited public fora. Amici Br. at 10-11. Numerous federal statutes and executive branch orders and rulings have likewise drawn the same distinction. Pet. at 34-36; Amici Br. at 12-15. Whether this distinction is Constitutionally permissible is consequently of national interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

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violate Free Exercise Clause), *aff'd in part*, 919 So.2d 392 (Fla. 2006).

Respectfully submitted,

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